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IBS BOOKSERVICE AG BASEL

v.

MAWADDAH ENTERPRISE SDN BHD

B

COURT OF APPEAL, PUTRAJAYA
ZALEHA ZAHARI JCA
KN SEGARA JCA
AHMAD MAAROP JCA
[CIVIL APPEAL NO: N-04-29-05]

C

4 MARCH 2008

CIVIL PROCEDURE: *Appeal - Record of appeal - Filing out of time - Identical applications made before sessions court and High Court - Whether High Court judge erred in allowing application when application*

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before sessions court was dismissed - Applicant did not withdraw High Court application despite undertaking given before sessions court - Whether appeal against High Court decision should be allowed in the circumstances - Subordinate Courts Rules 1980, O. 49 r. 6(2), (3)

E

CIVIL PROCEDURE: *Appeal - Record of appeal - Filing out of time application - Proper forum application to be made - Whether High Court or sessions court - Subordinate Courts Rules 1980, O. 49 r. 6(3)*

The appellant obtained a summary judgment against the respondent at the sessions court. The respondent filed a notice of

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appeal against that decision within time but failed to file the record of appeal at the High Court within the time frame as stipulated by O. 49 r. 6(3) of the Subordinate Courts Rules 1980 ('SCR'). The respondent then applied to the High Court to file the record of appeal out of time. The respondent upon retaining new

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solicitors, applied to the sessions court to file the record of appeal out of time on the ground that the High Court was not the proper forum to grant the said extension. When the respondent argued the case at the sessions court it gave an undertaking that its earlier application pending before the High Court would be

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withdrawn. The sessions court duly heard the application and dismissed it and the respondent did not lodge an appeal against that decision. The respondent, however, did not withdraw its application before the High Court contrary to its undertaking given before the sessions court. The High Court allowed the

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application. Hence, the appellant's appeal.

Held (allowing the appeal by a majority):
Per Zaleha Zahari JCA (with Ahmad Maarop JCA concurring)

(1) The High Court judge, in considering whether to exercise his discretion, should have taken into consideration the fact that the respondent's application for extension of time in the sessions court had been dismissed by the sessions court judge. The proper course of action was for the respondent to file an appeal against that decision. (para 7)

(2) The failure on the part of the respondent to honour its undertaking given prior to the hearing of the application for extension of time in the sessions court was a relevant factor which should be taken into consideration. The respondent's failure to act in accord with the said undertaking was clearly not *bona fides* on its part and must be held against it. (para 7)

(3) Upon the dismissal of the application before the sessions court, instead of moving the High Court's jurisdiction by way of an appeal against that decision, the respondent attempted to have a different order from the High Court contrary to its earlier undertaking given and admitted to be an irregular one. (para 8)

(4) The High Court judge erred in exercising his discretion in the manner that he did. Although an appellate court would not ordinarily interfere in the exercise of such a discretionary power, in the circumstances of the case the court was entitled to do so. (para 9)

Per KN Segara JCA (dissenting):

(1) The High Court judge clearly took into consideration the defendant's reasons in the affidavits to support the motion and the period of delay in filing the record of appeal. There was no evidence of any improper exercise of discretion to warrant appellate interference and reverse the said exercise of judicial discretion by the High Court judge in the circumstances of the case. (para 21)

(2) The motion in the High Court was filed well before an identical application was filed and dismissed in the sessions court. The sessions court, out of deference to the High Court, ought not to have proceeded to hear the identical

application before it. The application before the sessions court was a blatant abuse of process of court in the light of the pending motion at the High Court. (para 25)

(3) The plaintiff's contention that the sessions court was the correct forum to make an application for extension of time to file the record of appeal in the High Court was without merit and unsupported by authority. Order 49 r. 6(2) SCR expressly states that the notice of appeal shall be filed in the subordinate court but O. 49 r. 6(3) in unequivocal terms, states that the record of appeal shall be filed in the High Court. If the record of appeal is to be filed in the High Court, then common sense and logic must apply to mandate the High Court as the proper forum for an application for leave to file the record of appeal out of time. It is, therefore, untenable to suggest in the absence of any statutory provision that the subordinate court is the appropriate forum to obtain leave to file the record of appeal in a superior court. (para 27)

Bahasa Malaysia *Translation Of Headnotes*

Perayu memperoleh penghakiman terus terhadap responden di Mahkamah Sesyen. Responden memfail notis rayuan terhadap keputusan di dalam tempoh masa tetapi gagal memfailkan rekod rayuan di Mahkamah Tinggi dalam masa yang ditetapkan oleh A. 49 k. 6(3) Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR'). Berikutnya responden memohon di Mahkamah Tinggi untuk memfail rekod rayuan di luar masa. Setelah melantik peguamcaranya yang baru, responden bagaimanapun memohon untuk memfail rekod rayuan di luar masa di Mahkamah Sesyen atas alasan bahawa Mahkamah Tinggi bukanlah forum yang betul untuk memberi lanjutan masa tersebut. Apapun, responden, ketika menghujahkan kesnya di Mahkamah Sesyen, telah memberi akujanji bahawa permohonan terdahulunya di Mahkamah Tinggi yang masih menunggu keputusan akan ditarik balik. Mahkamah Sesyen telah mendengar permohonan responden dan menolaknya dan responden tidak memfail apa-apa rayuan terhadap keputusan tersebut. Bagaimanapun, bertentangan dengan akujanji yang diberikannya di Mahkamah Sesyen, responden tidak menarik balik permohonannya di hadapan Mahkamah Tinggi. Mahkamah Tinggi telah membenarkan permohonan yang tidak ditarik balik itu, dan perayu merayu.

Diputuskan (membenarkan rayuan melalui keputusan majoriti)
Oleh Zaleha Zahari HMR (Ahmad Maarop HMR menyetujui):

(1) Hakim Mahkamah Tinggi, dalam menimbang sama ada untuk melaksanakan budibicaranya, seharusnya mengambilkira fakta bahawa permohonan responden untuk lanjutan masa di Mahkamah Sesyen telah ditolak oleh hakim Mahkamah Sesyen. Cara bertindak yang betul adalah untuk responden memfail rayuan terhadap keputusan itu.

(2) Kegagalan responden memenuhi akujanji yang diberi sebelum pendengaran permohonan untuk lanjutan masa di Mahkamah Sesyen adalah satu faktor relevan dan perlu diberikan pertimbangan. Kegagalan responden untuk bertindak selaras dengan akujanji tersebut adalah tidak *bona fides* dan ia harus menanggung akibatnya.

(3) Setelah permohonannya ditolak oleh Mahkamah Sesyen, responden, selain dari gagal menggerakkan bidangkuasa Mahkamah Tinggi melalui satu rayuan terhadap keputusan, telah cuba mendapat satu perintah lain dari Mahkamah Tinggi dengan cara yang bertentangan dengan akujanjinya yang diberi terdahulu dan yang diakui olehnya sebagai satu perintah yang tidak teratur.

(4) Hakim Mahkamah Tinggi silap dalam melaksanakan budibicaranya dengan cara yang dibuatnya. Walaupun sebuah mahkamah rayuan kebiasaannya tidak akan mengganggu pelaksanaan budibicara seperti ini, dalam halkeadaan kes, mahkamah berhak untuk berbuat demikian.

Oleh KN Segara HMR (menentang):

(1) Hakim Mahkamah Tinggi jelas telah mengambilkira alasan-alasan defendan di dalam afidavit menyokong usul serta tempoh kelengahan dalam memfailkan rekod rayuan. Tiada keterangan mengenai apa-apa pelaksanaan budibicara yang tidak teratur bagi mewajarkan campurtangan rayuan bagi mengakas pelaksanaan budibicara kehakiman oleh hakim Mahkamah Tinggi dalam halkeadaan kes ini.

(2) Usul di Mahkamah Tinggi telah difailkan lama sebelum permohonan serupa difailkan dan ditolak oleh Mahkamah Sesyen. Mahkamah Sesyen, atas rasa hormat kepada Mahkamah Tinggi, tidak seharusnya meneruskan dengan

pendengaran permohonan yang serupa di hadapannya. Permohonan di hadapan Mahkamah Sesyen adalah satu salah guna proses mahkamah yang dibuat secara terang-terangan mengambilkira usul yang masih pending di Mahkamah Tinggi.

(3) Hujah plaintif bahawa Mahkamah Sesyen adalah forum yang wajar untuk membuat permohonan lanjutan masa untuk memfail rekod rayuan di Mahkamah Tinggi adalah tidak bermerit dan tidak disokong oleh autoriti. Aturan 49 k. 6(2) KMR dengan nyata menjelaskan bahawa notis rayuan hendaklah difailkan di mahkamah rendah tetapi A. 49 k. 6(3) dalam termanya yang mengandungi hanya satu maksud menyatakan bahawa rekod rayuan hendaklah difailkan di Mahkamah Tinggi. Jika rekod rayuan hendaklah difailkan di Mahkamah Tinggi, maka logik dan akal budi menuntut bahawa Mahkamah Tinggi harus menjadi forum wajar bagi permohonan kebenaran untuk memfail rekod rayuan di luar masa. Oleh itu, adalah tidak berasas untuk menyatakan, dalam ketiadaan mana-mana peruntukan statutori, bahawa mahkamah rendah adalah forum wajar bagi mendapatkan kebenaran untuk memfail rekod rayuan di mahkamah tinggi.

Case(s) referred to:
Cropper v. Smith [1884] 26 Ch D 710 ***(refd)***
Megat Najmuddin Dato (Dr) Megat Khas v. Bank Bumiputra (M) Bhd [2002] 1 MLJ 389 ***(refd)***
Lee Lan v. Lim Yoon Loy & Ors [1991] 3 CLJ 2393; [1991] 1 CLJ (Rep) 251 SC ***(dist)***

Legislation referred to:
Subordinate Courts Rules 1980, O. 26A, O. 49 r. 6(2), (3)

For the appellant - Prakash Menon (Geetha Supramaniam with him); M/s Isharidah, Ho, Chong & Menon
For the respondent - Amir Ismail; M/s Fahrol Pretam & Co

[Appeal from High Court, Seremban; Civil Appeal No: 12-70-2002]

Reported by Usha Thiagarajah

JUDGMENT

Zaleha Zahari JCA:

[1] My reasons for allowing the appeal with costs on 14 November 2007 are as follows.

Background

[2] The background facts are these: The appellant obtained summary judgment under O. 26A Subordinate Courts Rules 1980 ("the Rules") against the respondent *vide* Summons No. 52-1129-2000 filed at the Seremban Sessions Court on 31 October 2002. The respondent filed a notice of appeal against that decision of the Sessions Court within time on 12 November 2002. The appellant however failed to file the appeal record at the High Court Seremban within the time frame prescribed by O. 49 r. 6(3) of the Rules, ie, within twenty one days after filing of the notice of appeal. The three weeks lapsed on 3 December 2002.

[3] The respondent then, on 25 April 2003, filed a notice of motion in High Court Seremban (encl. (5)) for leave to file and serve an appeal record out of time, (ie, after a lapse of three months twelve days). The reasons given for the delay in filing the application of extension of time to file the record of appeal out of time were, *inter alia*, because of the long vacation due to the festive season of Aidil Fitri, problems in effecting a change of solicitors, as well as in not receiving instructions.

[4] The respondent then retained new solicitors, Tetuan Fahrol, Pretam & Co., (the respondent's new solicitors) to act for them. On 6 August 2004 the respondent's new solicitors filed a notice of motion in the Seremban Sessions Court, (encl. (58)), also for an extension of time to file and serve an appeal record out of time. At the time of filing of the second application for extension of time in the Seremban Session Court, the application for extension of time filed a year earlier in the High Court (ie, encl. (5)), was then pending and had yet to be disposed of. The reason given as to why the respondent's new solicitors considered it necessary to file the second application for extension of time at the Seremban Sessions Court was because they realized that the earlier extension of time application filed in the High Court by the respondent's previous solicitors was erroneous. The proper forum to grant an extension of time to file and serve a record of appeal was the Sessions Court, not the High Court.

[5] The appellant's counsel had in his submissions highlighted the fact that prior to the hearing of the second application before the Sessions Court Judge on 3 September 2004, the respondent's new solicitors had informed the Sessions Court Judge that they would be withdrawing the application for extension of time then

pending in the High Court. The Sessions Court Judge then duly proceeded to hear the application before her, and then dismissed it with costs. It is common ground that the respondent did not lodge an appeal against this decision dated 3 September 2004 of the Sessions Court Judge dismissing the application for extension of time.

[6] What happened next was this. The appellant did not then act in accordance with their statement before the Sessions Court Judge. They did not withdraw encl. (5), the extension of time application filed in the High Court. The High Court Judge duly heard encl. (5) on 15 April 2005. The High Court Judge was of the view that a delay of three months and 12 days in filing the application for extension of time was not inordinate, and that the respondent had not been prejudiced by the delay. He then allowed the application for extension in terms of encl. (5), which decision is the subject matter of appeal before this court.

[7] I am in agreement with the submission of the appellant's counsel that the High Court Judge, in considering whether to exercise his discretion, should have taken into consideration the fact that the respondent's application for extension of time in the Sessions Court had, been dismissed by the Sessions Court Judge. The proper course of action when this application for extension of time was dismissed by the Sessions Court Judge was for the respondent to file an appeal against that decision. I am also in agreement with the appellant's counsel submission that the failure on the part of the respondent's counsel to honour their undertaking given prior to the hearing of the application for extension time in the Sessions Court, was also a relevant factor which should have been taken into consideration. The respondent's failure to act in accord with the undertaking given in Sessions Court that the application then pending before the High Court, would be withdrawn was clearly not *bona fides* on their part and must necessarily be held against them.

[8] The respondent clearly had, on the facts of this case, two bites of the cherry. Upon the dismissal of the application before the Sessions Court, instead of moving the High Court's jurisdiction by way of an appeal against that decision, they then attempted to have a different order from the High Court by inviting the High Court to exercise its original jurisdiction, contrary to the earlier undertaking given, and admitted to be an irregular one. It is my finding that a defendant who has argued an application for

extension of time upon giving the undertaking that an irregularly filed application would be withdrawn, and after having had a *pari materia* regular application argued and fought on its merits, and lost, cannot be permitted to fall back upon an admitted irregular application.

[9] I am of the view that the High Court Judge had accordingly erred in exercising his discretion in the manner which he did. Although an appellant court would not ordinarily interfere in the exercise of such a discretionary power, in the circumstance of the present case I am of the view that I am entitled, and my duty to do so. The appeal is allowed with costs. The deposit to the appellant on account of taxed costs.

[10] My brother Justice Ahmad Hj Maarop has read this judgment in draft and has concurred with the contents therein.

KN Segara JCA (dissenting):

[11] This is an appeal against the decision of the learned High Court Judge allowing the respondent's notice of motion to file the record of appeal out of time, in respect of the respondent's appeal to the High Court at Seremban *vide* the summary judgment obtained against the respondent, at the Seremban Sessions Court.

[12] The appellant and the respondent herein were the plaintiff and defendant, respectively, in the Seremban Sessions Court summons No: 52-1189-2000. The appellant and the respondent shall hereinafter be referred to as "the plaintiff" and "the defendant".

[13] On 31 October 2002 the plaintiff obtained summary judgment against the defendant pursuant to O. 26A, Subordinate Courts Rules 1980 (SCR). The defendant filed a notice of appeal on 12 November 2002.

[14] Order 49 SCR embodies all the rules in respect of appeals to the High Court from the subordinate courts. Order 49 r. 6 SCR is the relevant provision with regard to an appeal to a judge in chambers of the High Court. An appeal in respect of a decision under O. 26A SCR shall lie to a judge in chambers of the High Court by virtue of O. 49 r. 6(1) SCR.

[15] After filing the notice of appeal and complying with O. 49 r. 6(2) SCR, the defendant unfortunately failed to comply with O. 49 r. 6(3) which reads:

A (3) Within 3 weeks after the filing of the notice of appeal, the appellant **shall file the record of appeal in the High Court,** and the record shall contain copies of:

(a) the application for the decision;

B (b) all pleadings filed;

(c) all affidavits filed in support of or in opposition to the application; and

(d) the order or draft of the decision appealed from:

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Provided that the record of appeal shall not include the notes of evidence, the grounds of judgment or any memorandum of appeal. (emphasis provided)

[16] It is important to keep focused that under this rule:

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i) the record of appeal shall be filed in the High Court, unlike the notice of appeal, which has to be filed in the registry of the relevant subordinate court in Form 140, under O. 49 r. 6(2) SCR; and

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ii) that there is no requirement, in express terms, that the record of appeal shall be served on any party, unlike the notice of appeal, which is to be served on every party to the proceedings within 14 days from the date on which the decision was pronounced under O. 49 r. 6(2) SCR.

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[17] For ease of comprehension O. 49 r. 6(2) reads:

(2) The appeal shall be brought by filing a notice of appeal in Form 140 in the registry of the relevant subordinate court, with a copy extended to the registry of the High Court, within 14 days from the date on which the decision was pronounced and serving a copy of the notice on every other party to the proceedings.

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[18] The significance of where the notice of appeal and the H record of appeal shall be filed, as statutorily prescribed will become apparent in the course of this judgment.

[19] Having failed to file the record of appeal in the High Court within the time prescribed under O. 49 r. 6(3) SCR, the I defendant very correctly filed a notice of motion in the High Court at Seremban on 25 April 2003, for leave to file the said record of appeal out of time. After hearing the parties and considering their written submissions the learned High Court Judge granted the

defendant leave, on 15 April 2005, to file the record of appeal out of time, in terms of the notice of motion. In exercising his discretion and in allowing the defendant's motion, the learned High Court Judge has very correctly borne in mind the *dicta* in:

(i) *Megat Najmuddin bin Dato (Dr) Megat Khas v. Bank Bumiputra (M) Bhd.* [2002] 1 MLJ 389, as follows:

> A judge should not be so besotted by the rules that his sense of justice and fairness becomes impaired because of his blinkered fixation on technicalities of the rules and the cold letter of the law … A fair minded judge should look at all circumstances of the case before penalizing the party who infringes any particular rule of procedure.

and,

(ii) *Cropper v. Smith* [1884] 26 Ch. D 710 as follows:

> It is well established principle that the object of the court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights … I know of no kind of error or mistake which, if not fraudulent or intended to over reach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy.

[20] A statement on the object of the court by Bowen LJ, above, as way back as in the 19th century, holds true to this day and, shall forever remain a guiding principle, in the administration of justice.

[21] It is patently clear that the learned High Court Judge had taken into consideration the defendant's reasons in the affidavits to support the motion and the period of delay in filing the record of appeal. In my considered judgment, there is no evidence of any improper exercise of discretion to warrant appellate interference and, reverse the said exercise of judicial discretion by the learned High Court Judge, in the circumstances of this case.

[22] In his grounds of decision he has set out as follows:

> Antara alasan-alasan yang diberikan peguam pemohon bagi menyokong permohonan ini ialah mengenai perkara yang berkaitan dengan cuti panjang sempena musim perayaan Hari Raya Aidil Fitri, masalah penukaran peguam, masalah mendapatkan arahan dari anakguam dan juga beberapa masalah lain.

Menurut pliding yang difailkan perayu sepatutnya memfailkan Rekod Rayuannya pada 13.2.2003. Namun hanya pada 25.4.2003 perayu telah memfailkan permohonan perlanjutan masa ini. Di atas sebab ini responden plaintif membantah permohonan perayu ini.

Keputusan Mahkamah

Di dalam menimbangkan permohonan ini Mahkamah mengambil kira dan memberi perhatian kepada perkara berikut:

i) Jangkamasa kelewatan memfailkan rekod rayuan berkenaan dan permohonan perlanjutan masa.

Di dalam kes ini perayu telah memfailkan permohonan ini 2 bulan 12 hari selepas tamat tempoh pemfailan Rekod Rayuan. Ini pada hemat saya bukan satu kelewatan yang melampau yang memprejudiskan responden.

Di dalam kes *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd.* [2002] 1 MLJ 389, Mahkamah Persekutuan antara lain telah memutuskan seperti berikut:

> A judge should not be so besotted by the rules that his sense of justice and fairness becomes impaired because of his blinkered fixation on technicalities of the rules and the cold letter of the law … A fair minded judge should look at all circumstances of the case before penalizing the party who infringes any particular rule of procedure.

Di dalam kes *Cropper v. Smith* [1884] 26 Ch. D 710 Bowen LJ berkata:

> It is well established principle that the object of the court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights … I know of no kind of error or mistake which, if not fraudulent or intended to over reach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy.

Berdasarkan perkara (i) di atas dan dengan mengambil iktibar dan teladan dari nas-nas di atas saya membenarkan permohonan perayu dengan kos di bayar kepada responden.

[23] The plaintiff contends before us that the defendant had, on 20 August 2004, made an application in the Sessions Court identical to the motion pending in the High Court. The plaintiff alleged that the application was made in the Sessions Court on

the ground the motion in the High Court was erroneously filed and, that the proper forum to grant an extension of time is the Sessions Court. The plaintiff also alleged that it was on that basis the application before the Sessions Court was heard. The Sessions Court dismissed the defendant's application to file the record of appeal in the High Court out of time on 3 September 2004.

[24] The plaintiff contends before us that the defendant should have appealed against the Sessions Court decision. The plaintiff further contends before us that instead of appealing and, contrary to an "undertaking" to withdraw the notice of motion pending before the High Court, proceeded with the said notice of motion in the High Court. The plaintiff also contends before us that the High Court proceeded to hear defendant's motion despite the plaintiff's objection to its validity.

[25] It is my considered judgment that the plaintiff's contentions before us are groundless in law. The motion in the High Court was filed well before an identical application was filed and dismissed in the Sessions Court. The Sessions Court, out of deference to the High Court, ought not to have proceeded to hear the identical application before it. The application before the Sessions Court was a blatant abuse of process of Court in the light of the pending motion at the High Court.

[26] No "undertaking" given by counsel can become a legal impediment to the pending motion at the High Court – it is a collateral issue of no consequence. Breaches of "undertaking" by counsel should be the subject matter of complaint to the disciplinary board for appropriate action.

[27] The plaintiff's contention, that the Sessions Court is the correct forum to make an application for extension of time to file the record of appeal in the High Court, is without merit and unsupported by authority. Order 49 r. 6(2) SCR expressly states that the notice of appeal shall be filed in the subordinate court but O. 49 r. 6(3), in unequivocal terms, states that the record of appeal shall be filed in the High Court. If the record of appeal is to be filed in the High Court, then, common sense and logic must apply to mandate the High Court as the proper forum for an application for leave to file the record of appeal out of time. It is, therefore, untenable to suggest, in the absence of any express statutory provision, that the subordinate court is the appropriate forum to obtain leave to file the record of appeal in a superior court.

[28] The case of *Lee Lan v. Lim Yoon Loy & Ors* [1991] 3 CLJ 2393; [1991] 1 CLJ (Rep) 251, is not an authority for the proposition that the subordinate court is the proper forum to obtain leave to file out of time, the record of appeal in respect of an appeal to a judge in chambers of the High Court. In that case, the issue that cropped up, *inter alia,* was with regard to the service of the notice of appeal out of time in respect of a decision that did not fall under O. 49 r. 6(1) SCR. It was not a summary judgment under O. 26A SCR. The claim was for vacant possession and was allowed by the magistrate. The notice of appeal was filed in the magistrate's court the same day but, was not served on the plaintiff. There, O. 49 r. 2(1) SCR and O. 49 r. 2(3) SCR were the relevant provisions for consideration. In that case Harun Hashim, SCJ said:

> We are of the view, however, that the application for extension of time, could also be properly made to the High Court as the High Court has the power, not under RHC O. 3 r. 5 because that provision is limited to matters prescribed by RHC (and the time prescribed to serve a notice of appeal from a magistrate's court arises under SCR) but under item 8 of the Schedule to the Courts of Judicature Act 1964. We would, nonetheless, discourage such a practice because of higher costs in the High Court and unnecessary clogging of the High Court calendar. Be that as it may, there was accordingly a proper application before the High Court in this instance.

[29] The appeal is dismissed with costs. Deposit towards taxed costs of the respondent.